UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DAVID J. SIEPKER, Plaintiff, vs. LARRY G. MASSANARI, Acting Commissioner of Social Security, Defendant.	No. **C01-3066-PAZ** **MEMORANDUM OPINION AND ORDER**

TABLE OF CONTENTS

I. INTRODUCTION

The plaintiff David J. Siepker ("Siepker") appeals the decision by an administrative law judge ("ALJ") denying him Title XVI supplemental security income ("SSI") benefits. Siepker claims he is disabled due to panic disorder, agoraphobia, and stomach problems. He argues the ALJ erred in numerous respects, including, among others, making an unfair and inappropriate credibility assessment; submitting an inaccurate hypothetical to the Vocational Expert; improperly weighing the evidence; failing to develop the record fully and fairly; and reaching conclusions not supported by substantial evidence in the Record. He also argues the Appeals Council erred in failing to consider a psychological examination from a treating physician. In response, the Commissioner argues the ALJ's conclusions are supported by substantial evidence on the Record as a whole.

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

Siepker protectively filed an application for SSI benefits on March 4, 1998, claiming a disability onset date of June 1, 1996.[1] (R. 14, 116-18) The application was denied initially on September 4, 1998 (R. 17, 87, 100-02), and on reconsideration on November 23, 1998 (R. 17, 88, 105-09). Siepker requested a hearing which was held on May 12, 1999, in West Des Moines, Iowa, before ALJ Jean Ingrassia. (R. 53-84) Attorney Robert L. Johnson represented Siepker at the hearing. Siepker and Vocational Expert ("VE") Marian Jacobs testified at the hearing. On September 22, 1999, the ALJ issued her opinion denying Siepker's claim for benefits. (R. 11-31) The Appeals Council denied Siepker's request for

[1]Siepker filed earlier applications for SSI and DI benefits in 1993, which were denied at the initial level. He filed a second application for SSI benefits in 1996, which was denied both initially and on reconsideration. Siepker did not appeal these unfavorable determinations. (*See* R. 14; Doc. No. 17, note 1)

review on July 3, 2001 (R. 5-6), making the ALJ's decision the final decision of the Commissioner.

Siepker filed a timely Complaint in this court on August 16, 2001, seeking judicial review of the Commissioner's ruling. (Doc. No. 1) The parties consented to jurisdiction of this case by a United States Magistrate Judge, and on September 25, 2001, the Honorable Donald E. O'Brien transferred the case to the undersigned for further proceedings and the entry of judgment. (Doc. No. 5)

Siepker filed a brief in support of his appeal on January 24, 2002 (Doc. No. 10) On March 6, 2002, the Commissioner filed a motion for remand pursuant to sentence four of 42 U.S.C. § 405(g) (Doc. No. 12). The court reserved ruling on the motion and directed the Commissioner to file her substantive brief (Doc. No. 14), and on March 19, 2002, the Commissioner filed her brief resisting Siepker's appeal. (Doc. No. 17) Siepker filed a reply brief on March 27, 2002 (Doc. No. 18). The court now deems this matter fully submitted, and pursuant to 42 U.S.C. § 405(g), turns to a review of Siepker's claims for benefits.

B. Summary of the Record

1. Introductory facts and Siepker's daily activities

At the time of the hearing, Siepker was living in a two-bedroom apartment in Carroll, Iowa, with his six-year-old daughter, Ashley.[2] Siepker graduated from high school and then took an auto mechanics course for about three months, although he never worked as an auto mechanic. (R. 56-57, 69)

[2]Ashley's mother is Siepker's former girlfriend, Stephanie. Stephanie apparently also has another child, Sebastian, whom Siepker refers to as his son "because his father ran out on him and I chose to raise him myself." (R. 71) It is not clear from the record whether Sebastian lives with Siepker and Ashley, although Siepker apparently cares for Sebastian on a regular basis.

Siepker described his condition as "[s]evere agoraphobia, panic attacks, [and] basically, an inability just to deal with the general public on my own." (R. 57) He explained the agoraphobia "makes it very difficult for me to leave my house."

> I do go to the grocery store. I can take a cab and make it as fast as possible. I'm usually in and out. I have a friend of mine, that I grew up with, ever since about sixth grade . . . [who] drives me to a lot of places. He drove me here today. And he understands that if something happens and I start feeling this way, that he has to get me home. And that's usually my safe place, at my house, my apartment.

(R. 58) From 1991 to 1997, Siepker's former girlfriend, Stephanie, provided him with transportation. Siepker has not driven for at least two years. Although he does have a driver's license from Colorado, he never obtained an Iowa license after moving to Iowa about three years before the hearing. (R. 58-59)[3]

Siepker can handle household chores like dishes, vacuuming, cleaning, and taking care of his kids, and he has little trouble being alone at his home. If he goes out, he may start to hyperventilate, dry heave, vomit, get the shakes, get dizzy, and feel like he is going to pass out. (Siepker said he had a paper bag in his pocket during the hearing in case he began to hyperventilate.) His symptoms will appear whenever he is not in control of his situation, such as "[b]eing in a car, getting stopped at a stop light, getting stopped by a train, not being able to move and keep things going, . . . [a] person in the check out aisle at the grocery store writing out a check." Siepker has not left his house alone for over two years; someone is always with him, whether it be his daughter, a friend or relative, or a taxi cab driver. (R. 59-60)

Ashley has lived with Siepker her entire life of six years. They get up at 7:00 a.m., and he gets his daughter dressed and fed. He walks her to the glass door at the front of the

[3]Siepker lost his license initially as the result of an OWI charge in June 1997. (R. 73)

apartments, and watches while she walks across the street to her school. He will attend parent-teacher conferences with Stephanie, but not alone, and he does not attend any other school activities. (R. 60-61)

Siepker first saw Dr. Liautaud back in 1990, when he first began having trouble with agoraphobia, and he resumed treatment by Dr. Liautaud about a year prior to the hearing. (R. 57) He sees Dr. Liautaud every four to six weeks. (R. 76) Siepker takes Klonopin, which he described as an anti-anxiety medication, and Pamelor, which is an anti-depressant. He also takes medication for his stomach. (R. 61-62)

Siepker stated he has no social life. He has a few friends who come over to keep him company, but they initiate contact with him rather than vice versa. He does not go to the movies or restaurants. His inability to go places contributed to his breakup with Stephanie. (R. 62) Dr. Liautaud's office is a little over a mile away, and Siepker is fairly comfortable going to the doctor's office by cab. Siepker said the doctor "makes me wait in the waiting room as long as he can, to try to see how long I can take it before I will actually get up and walk out." (R. 63)

Siepker described his daily routine as follows:

> 7:00, I get her up. She has to be to school at quarter after eight. She likes to watch her cartoons and get dressed, fed, and her hair brushed. Send her off to school. And, basically, I watch a lot of news, a lot of TV throughout the day, talk to people on the phone. When she gets home from school, we go through her school work, work on her school work. Sometimes we play video games. I cook supper. We have a snack about an hour before she goes to bed. She goes to bed at 9:00. Basically, that's about all we do.

(R. 63-64) Siepker does not go to any parties or visit friends, although his aunt picked him up and took him to visit his grandmother on Mother's Day. Prior to the hearing, he had not been outside the city limits of Carroll, Iowa, for over two years.

Siepker does not think he could deal with a job, stating that having to be somewhere at a certain time, for a determined amount of time, would be incomprehensible to him. (R. 64) If he has to go out, he finishes his business and returns home as soon as possible. He stated he was very uncomfortable just being in the hearing room with one other person present. The only way he can resolve his symptoms is to get back home where he feels safe. (R. 65) He leaves his home for an hour or less every three days, to go to the grocery store. (R. 68)

Siepker's spleen ruptured in May of 1998, from what he described as "a very rare disease." (R. 65) He had been drinking prior to that time, but he quit drinking "last May 18th." (R. 66) He explained that drinking "used to calm me down and make me deal with things better, but when you wake the withdraw[al] is so bad, the anxiety just skyrockets." (*Id.*) Until he started seeing a doctor for his condition, Siepker used alcohol in an attempt to control his symptoms. Siepker still smokes about half a pack a day, but Dr. Liautaud told him not to use any other drugs or alcohol. (*Id.*) Siepker said his condition was much worse when he was drinking "[b]ecause the mornings were just unbearable." (R. 67) He has not been drinking since his hospitalization in 1998, and Siepker believes his doctor is satisfied with his compliance. (R. 67)

Siepker gets $364.00 per month in public assistance, and he gets food stamps. He lives in a rent controlled building. He has no other income. He was referred to a vocational rehabilitation clinic but was unable to follow through with the classes because he could not stand to be in class for two hours at a time. (R. 68)

Siepker had a telemarketing job in Colorado for about two months in 1991 or 1992. He had an anxiety attack in the office and was "never able to walk back into the building again." (R. 69-70) He worked as a carpet layer in private homes in Carroll, Iowa, in 1989 or 1990. (R. 70) He also worked for about nine months as a production assembler in 1987. (R. 81)

When he lived in Colorado, Siepker stayed with friends and his brother, and he "was homeless a lot." (R. 70) He also lived with his girlfriend Stephanie. She came back to Iowa with him, and they broke up about two years prior to the hearing. (*Id.*) He and Stephanie have shared custody of Ashley. Siepker stated his condition does not interfere with his ability to care for Ashley. (R. 71)

The ALJ questioned Siepker about his drinking history. (R. 73-76) Despite entries in the medical records to the contrary, Siepker maintained that he quit drinking before he was hospitalized in May of 1998, with the ruptured spleen. He stated the doctor's notation that they monitored him closely for alcohol withdrawal "was completely unnecessary" because he "was not drinking, at that time." (R. 74) The ALJ pointed out two times when Siepker said he was not drinking but the medical records indicate otherwise. (*See* R. 73-74) In addition, she noted Siepker left the hospital against medical advice. Siepker explained he was "off all machines" and "[t]here was no reason for me to be there." (R. 75) The doctors wanted him to have additional tests, which Siepker felt could be done in Carroll, Iowa. When the ALJ asked about his discharge diagnosis of "alcohol abuse with possible relapse," Siepker explained, "There's always a possibility of relapse." (*Id.*) Siepker maintained throughout the hearing that he quit drinking on May 18, 1998, and would have one year sober the week after the hearing. (*Id.*)

Siepker's former girlfriend, Stephanie, was preparing to move to Oregon, which would leave Siepker with sole care of his daughter. Siepker said he considers himself to be mentally stable and able to care for Ashley. (R. 75, 78)

The ALJ pointed out that medical records indicate Siepker has been noncompliant with his medications on numerous occasions. Siepker pointed out his noncompliance was "a long time ago" in 1990, and he explained:

> I've been through a lot since then. Even Dr. Leotoad [sic], if you talk to him in person, he'd tell you, I'm keeping my doctor's appointments, I've been staying on my medication,

> I'm staying off the things I'm suppose[d] to be staying off. My weight's up. My weight's up about 30 pounds.

(R. 78)

2. Vocational expert's testimony

The ALJ asked the VE the following hypothetical question:

> So, I want you to take into consideration a 32 year old, younger individual, with a twelfth grade education. His history is one of emotional problems including depression, anxiety . . . [a]nd substance addiction disorder. These impairments would only slightly limit his activities of daily living, but he seems to have marked difficulty in certain social functioning. He does have friends, he does have family, and he does have a girlfriend. So, that would be between moderate and marked. It does . . . not seem to affect his ability to concentrate and there is no evidence that he has or has had episodes of deterioration in work and work like settings. In fact, his work activity, basically, ended early on. 1991 he had minimal earnings, but he did work in '87, '88, '89. With just those particular restrictions, would he be able to perform any of his past work activity?

(R. 82) The ALJ clarified that the hypothetical claimant would have only moderate limitations in social functioning. (R. 82-83) The VE responded that the hypothetical claimant "could probably perform both of his jobs as carpet layer and production assembler."

The ALJ then added anxiety disorder accompanied by agoraphobia to the hypothetical, and the VE replied the hypothetical claimant would be precluded from all employment. (R. 83)

3. Siepker's Medical History

The record indicates Siepker has a history of gastrointestinal problems that ultimately resulted in a serious gastrointestinal bleed in May 1998, and a second massive upper GI bleed in July 1998, that required Siepker to be placed on a respirator. The record indicates that when Siepker refrained from drinking and smoking and took his medications as directed, his gastrointestinal symptoms were greatly improved. Siepker acknowledges that "[h]is physical complaints, in and of themselves, are not disabling," and therefore his physical condition will not be discussed further in this opinion, except as it relates to his other complaints. (Doc. No. 10, p. 2) His alleged disability in this case is due to "his anxiety disorder, panic disorder, agoraphobia and depressive disorder." (*Id.*, pp. 10-11)

Siepker first began seeing doctors for mental health problems in 1990, when he was seen at a mental health center in Carroll, Iowa. Siepker was noncompliant with his medication regimen of Prozac and Klonopin, and he was admitted into the hospital on January 5, 1991, with diagnoses of Acute Alcohol Withdrawal, Generalized Anxiety Disorder, Panic Attacks with Agoraphobia, and a history of an Adjustment Disorder with depressed and anxious mood, in remission. Upon his release, Siepker was referred to T.R. Liautaud, D.O. for a disability evaluation. Dr. Liautaud diagnosed Siepker with Generalized Anxiety Disorder; Panic Disorder, with agoraphobia; Adjustment Disorder with mixed emotional features; depression and anger by history; Alcohol dependence; alcohol intoxication; and mixed substance abuse by history. (R. 216)

Siepker then apparently moved to Colorado. He was seen in a Denver hospital on September 27, 1993, complaining of shaking, breathlessness, a lump in his throat, tingling in the extremities, dry mouth, overwhelming fear, and nearly constant "anxiousness." (R. 211) Siepker stated his anxiety symptoms incapacitated him and he was unable to work. He told doctors that drinking alcohol curbed his anxiety and allowed him to function. He was diagnosed with agoraphobia with panic attacks and alcohol abuse, and doctors noted he

would have to quit drinking and possibly receive medical detox before they could treat him for anxiety. (*Id.*)

Siepker was evaluated in Denver on October 15, 1993, for his complaints of anxiety and panic attacks, and reported he had suffered from agoraphobia for three years. He was alternating Klonopin and Xanax, and reported he had taken Imipramine while he was in Iowa. He also was taking Tagamet for ulcers and Diazepam for anxiety. Siepker said he had been abusing alcohol sporadically since age 16, and reported he was drinking about a six-pack a day to curb his anxiety symptoms. (R. 210)

Siepker saw doctors intermittently over the next year. He continued to report symptoms of anxiety and agoraphobia. He claimed he could not cope with leaving the house for appointments and asked doctors to prescribe medications over the phone, which they declined to do. He was able to get a prescription for Valium, but after he missed several appointments the doctor would not authorize further refills. Siepker told one doctor he had tried to stop drinking for two months but was unable to cope, so he returned to drinking and taking Valium "just to get out of the house." (R. 205) On October 7, 1994, Siepker was referred to a psychiatrist, Dr. Yost, for follow-up of Siepker's panic attacks, severe anxiety, depression and alcohol abuse. On the consultation request form, the referring doctor noted, "Management of anxiety/agoraphobia has been very difficult given addictive nature of alcohol/[illegible]/tobacco history. Help me out!" (R. 206) The record does not indicate Siepker ever followed up by seeing Dr. Yost.

Siepker returned to Iowa at some point, and he stopped by Dr. Liautaud's office on June 30, 1995, to request prescription refills. A nurse told Siepker he would have to make an appointment because the doctor had not seen him in several years. Siepker said he had been sober for 60 to 90 days and was attending Alcoholics Anonymous meetings; however, he later admitted to having two drinks before coming to the doctor's office. He appeared at the doctor's office again on October 23, 1995, wanting a refill of Valium. He denied

using any street drugs, but reported he was continuing to drink alcohol. Siepker waited 25 minutes to see Dr. Liautaud and then left because he felt his heart racing and was experiencing chest pain.

Siepker saw Dr. Liautaud for a disability evaluation on August 22, 1996. He reported continued panic attacks and agoraphobia, and stated he had been unable to maintain employment due to his panic disorder symptoms. At the doctor's office, Siepker was unable to go to the fourth floor due to a panic attack and claustrophobia that occurred in the elevator.

Siepker told Dr. Liautaud that from 1992 to 1994, he drank alcohol daily to the point of intoxication to control his panic and agoraphobic symptoms. Dr. Liautaud noted the following regarding Siepker's mental status examination:

> Mr. David Siepker is a 29-year-old, single, ambulatory, male who appeared his stated age. He was adequately dressed and groomed, no evidence of habit deterioration or abnormal psychomotor activity. Mr. Siepker was alert and orientated. Speech was somewhat over-inclusive with an agenda regarding his inability to work, but eventually goal-directed. Memory was essentially intact; intellect is estimated in the average range. Mood was neutral; affect was slightly constricted but also anxious. Mr. Siepker displayed no evidence of psycho-motor agitation; admits to some depression, anxiety, and Panic Disorder symptoms. He reports sleep problems with problems falling asleep, maintaining sleep, but sleeps better with the Valium; denies terminal insomnia; reports he can sleep late in the day. He reports intrusive thoughts; denies appetite problems – in fact, has gained weight since June 1995; denied crying spells since June 1995; reports mood swings, irritability. He described himself as having temper control problems, a "short fuse," but there has been no destructive behavior or self-abuse. He denies energy loss; reports concentration problems, denies memory problems; reports hopelessness but not helplessness; denies anhedonia; reports a diurnal mood variation in the morning; reports he is avoidant and withdrawn;

> denies self-esteem problems. He reports he feels guilty, states his girlfriend works full and part-time, and he is Mr. Mom, cannot work. He reports libido loss; denies suicidal ideation and there have never been any attempts, Panic Disorder symptoms and, of significance, the last panic attack he reported was in 1995 and that resulted in his being seen at the local emergency room. He reports he develops anxiety in situations and leaves now before the panic attack occurs, and is able to calm himself down. When he has a panic attack, he reports he feels nervous and restless inside, has a queasy stomach, sweaty palms, light-headedness, bilateral tremor; reports shortness of breath, hyperventilation, rapid heartbeat, increased sighing, overheating, dry mouth; denied difficulties swallowing; reports paresthesia, dizziness, feelings of impending doom, feeling a sense of needing to flee a situation. He reports that when he is anxious and feels he is developing a panic attack he will have to throw cold water in his face, take Valium, then tries to relax. He reports some feelings of depersonalization, but denies derealization.

(R. 218) Dr. Liautaud diagnosed Siepker as follows:

Axis I	Generalized Anxiety Disorder; Panic Disorder with agoraphobia; Major Depression, by history; Adjustment Disorder, by history; Alcohol dependence and mixed substance abuse, by history.
Axis II:	Deferred.
Axis III:	Gastroenteritis; History of sinus infections.
Axis IV:	Problems with primary support group; Problems related to social environment.
Axis V:	Current GAF, 40; GAF in the last year, 40.

(*Id.*) The doctor noted Siepker appeared to be "fairly responsible" and could manage benefits. He opined "that Mr. Siepker does meet criteria for agoraphobia and Panic Disorder symptoms." (*Id.*)

For purposes of Siepker's disability examination, Dr. Liautaud found Siepker to have the following limitations in work-related activities:

> With his current diagnoses[,] Mr. Siepker has a history of not doing well in a closed environment, and it is felt he would have difficulties remembering and understanding instructions, procedures, and locations if he develops Anxiety/Panic Disorder symptoms. It is felt that he would also have problems carrying out instructions, maintaining attention, concentration, and pace if he was experiencing Panic Disorder symptoms. It is felt he would have problems interacting appropriately with supervisors, co-workers, and the public, again, if he developed Panic Disorder symptoms, and felt he would have problems with exercising good judgment and responding appropriately to change in the work place if he developed Panic Disorder symptoms.

(R. 219)

John Garfield, Ph.D. performed a Psychiatric Review Technique on September 15, 1996, in connection with Siepker's application for disability benefits. He concluded Siepker was moderately restricted in the activities of daily living and difficulties in maintaining social functioning, and frequently experienced deficiencies of concentration, persistence or pace resulting in a failure to complete tasks in a timely manner, in work settings or elsewhere. (R. 220-28) In a Physical Residual Functional Capacity Assessment performed on November 25, 1996, Robert Knox, M.D. reported Siepker had no exertional, postural, manipulative, visual, communicative, or environmental limitations, and no physical impairment of functioning. Dr. Knox noted Siepker had a problem with alcoholism, but no noted physical problems arising from his alcoholism. (R. 248-55)

Dr. Garfield performed a Mental Residual Functional Capacity Assessment of Siepker on September 15, 1996, and found Siepker to be moderately limited in his ability to understand, remember and carry out detailed instructions; maintain attention and concentration for extended periods; perform activities within a schedule, maintain regular

attendance, and be punctual within customary tolerances; complete a normal workday and work week without interruptions from psychologically based symptoms; perform at a consistent pace without an unreasonable number and length of rest periods; and respond appropriate to changes in the work setting. Dr. Garfield noted Siepker had not had any specialty treatment for several years, and opined that "with proper treatment [Siepker] should be able to engage in routine competitive work before June 1, 1997." (R. 232)

Siepker failed to comply with his medication regimen and missed numerous counseling appointments over the next three months. He began seeing a counselor with the Carroll County Support Program in February 1997. At the intake appointment on February 25, 1997, which was conducted in Siepker's home, he reported he was too agoraphobic to leave home. However, the counselor noted Siepker went to the grocery store and he had been working on his car in the apartment parking lot. Siepker drank beer during the interview, stating it helped him to relax because he was nervous having strangers in his home. He also chain smoked during the interview. The counselor offered to drive Siepker to the psychiatrist, and to help him fill out a disability application. Siepker declined help, and stated he blamed Dr. Liautaud for his inability to obtain Social Security benefits because Dr. Liautaud's report said if Siepker would take his medication as directed, he could be working in three months.

Siepker failed to show up for his appointment with Dr. Liautaud on June 25, 1997. He next saw the doctor on August 19, 1997, for a psychiatric diagnostic evaluation. Siepker reported continued anxiety, panic, agoraphobia and depression symptoms, and noted he often took Valium for panic attacks. The doctor noted Siepker looked haggard and had lost a significant amount of weight. He displayed psychomotor agitation and appeared significantly anxious, panicky and depressed. Siepker had been charged with driving while impaired in June, and was scheduled to spend 48 hours in jail. Dr. Liautaud felt Siepker would not be able to remain incarcerated for any period of time. He recommended in-home

individual supportive and cognitive therapy, prescribed Klonopin, and told Siepker to discontinue the Valium.

When Siepker next saw Dr. Liautaud on November 24, 1997, he denied alcohol use and medication side effects, and reported he was not sleeping well. Dr. Liautaud found Siepker continued to meet the diagnostic criteria for Major Depression, Generalized Anxiety and Panic Disorder with agoraphobia, alcohol abuse and dependence by history. He noted Siepker's symptoms were marginally controlled with Paxil and Klonopin. When Dr. Liautaud next saw Siepker on December 30, 1997, Siepker's children accompanied him to the appointment and Siepker reported his condition was improving with his current medications. He reported some sexual dysfunction and the doctor prescribed Wellbutrin. Siepker continued to meet the diagnostic criteria for Major Depression, Generalized Anxiety and Panic Disorder with agoraphobia, alcohol abuse and dependence by history.

Siepker saw Dr. Liautaud on February 5, 1998, and reported his depression, anxiety and panic disorder were improving. He had not filled the prescription for Wellbutrin, but reported his sexual dysfunction also was improving. The doctor noted Siepker had some psychomotor slowing and tremor of his upper extremity but showed no evidence of habit deterioration. He was tolerating the Paxil and Klonopin well. Siepker had lost 20 pounds due to the flu. At Siepker's next scheduled appointment on February 11, 1998, he waited for the doctor for an hour and then left. He returned on March 17, 1998, complaining that he was hearing voices when he was falling asleep or waking up. Dr. Liautaud told him the voices were hypnopompic hallucinations[4] and were quite common.

On April 8, 1998, Siepker saw a medical doctor complaining of back pain, and was diagnosed with a kidney infection. File notes indicate Siepker "is an alcoholic and has been drinking." (R. 288) He was admitted to the hospital several weeks later after vomiting

[4]*See* Appendix, note 6.

blood and passing bloody stools. The file notes dated May 19, 1998, indicate Siepker had consumed several cans of beer and several shots of Schnapps the evening before his admission. (R. 309) He reported that he was drinking up to a 12-pack of beer daily and also drinking hard liquor. (R. 307) Siepker told Dr. Liautaud his depression had improved, although he continued to have sleep problems and panic symptoms. Dr. Liautaud diagnosed Siepker with panic disorder with agoraphobia, generalized anxiety disorder; major depression, recurrent, moderate without psychotic features or suicidal ideation; alcohol abuse/dependence by history. His discharge diagnoses by Dr. Jensen on May 22, 1998, were gastroenteritis bleed, anemia from acute blood loss, thrombocytopenia, alcoholic cirrhosis, chronic alcoholism, tobacco abuse, and panic disorder with agoraphobia.

Siepker saw Dr. Liautaud for follow-up on May 27, 1998, and reported he was eating, gaining weight, and not having anxiety and panic disorder symptoms or depression. Dr. Liautaud prepared an evaluation for Disability Determination Services dated May 28, 1998, in which he stated Siepker had not shown adequate response to treatment and had a guarded prognosis. Siepker told the doctor that he had not been able to sustain employment since 1991, due to his agoraphobia and panic disorder symptoms, but he had no restrictions of the activities of daily living, and no problems managing his own finances. The doctor made the following assessment of Siepker's abilities:

> Mr. Siepker reports and it is agreed, that he would have great difficulties in remembering and understanding instructions, procedures and locations in work activity, especially if it is involving working in any complicated situation with the public or with other workers. He would have difficulty carrying out instructions, maintaining attention, concentration and pace and in any complicated work activity, he would have great difficulties interacting appropriately with supervisors, co-workers, and the public. This is agreed and he would also have difficulties using good judgment or responding to changes in the work place because of his agoraphobia and difficulties with being in the company of co-workers or the public.

(R. 317)

When Siepker next saw Dr. Liautaud on June 16, 1998, the doctor noted Siepker "has not followed the instructions regarding the Paxil 10 mg. twice a day." (R. 350) Nevertheless, Siepker's medications were "adequately controlling the current symptoms of anxiety and panic[;] however, [I] do see some increase in depression with his anger, [and he] is frustrated over financial situations." (*Id.*)

Oh July 20, 1998, Siepker was hospitalized for a serious GI bleed of uncertain etiology. He underwent numerous tests but no clear diagnostic conclusion was reached. The hospital notes indicate Siepker had abstained from alcohol use since May 1998, "but it is certainly possible that this could have relapsed." (R. 323) Dr. Roger Liu advised Siepker to stop using alcohol and stop smoking. (R. 326)

On August 21, 1998, Jan Hunter, D.O. prepared a consultation report for Disability Determination Services. The doctor opined that if Siepker continued to abstain from alcohol, his physical condition "should improve to the point where he would again have no more than a minimal impact on his ability to work," and he "should be able to return to unrestricted activities" by May 1999. (R. 352) Presumably, the doctor did not address the impact of Siepker's alcoholism on his ability to work because Siepker reported he had quit drinking on May 18, 1998, "because he realized the implications and complications that drinking was causing him." (*Id.*)

Siepker saw Dr. Liautaud again on August 26, 1998. He reported things generally were going well, but his anxiety and panic disorder symptoms had worsened since his children returned home from a trip to Colorado. Siepker would feel panicky at times, and would take extra Klonopin to compensate. The doctor increased Siepker's Paxil dosage.

Sandra L. Davis, Ph.D. performed a consultative review of Siepker's records on September 2, 1998, and found Siepker would be markedly impaired with respect to maintaining a consistent work pace, keeping to a regular schedule, and working with others.

Dr. Davis noted Siepker's depression and anxiety could impair his concentration and intellectual abilities, especially with detailed or complex tasks, but he should be able to carry out simple instructions. The doctor noted that although Siepker was reporting to physicians and friends that he had been abstinent from alcohol since May 1998, his hospitalization for the severe GI bleed in July 1998 called his credibility into question. (R. 353) Of significance, Dr. Davis noted that the extent of Siepker's anxiety and depression may not have been seen yet when he is free from alcohol and withdrawal symptoms. (R. 354)

Dr. Davis also performed a Psychiatric Review Technique on September 2, 1998. She found Siepker to have a slight restriction of the activities of daily living, and marked difficulties in maintaining social functioning. She again found Siepker's report that he had been abstinent from alcohol since May 19, 1988, to be unreliable.[5]

In a concurrent Mental Residual Functional Capacity Assessment, Dr. Davis found Siepker to be moderately limited in the ability to understand, remember and carry out detailed instructions; maintain attention and concentration for extended periods; interact appropriately with the general public; and respond appropriately to changes in the work setting. She found Siepker to be markedly limited in the ability to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances; sustain an ordinary routine without special supervision; work in coordination with or proximity to others without being distracted by them; complete a normal workday and work week without interruptions from psychologically based symptoms; perform at a consistent pace without an unreasonable number and length of rest periods; accept instructions and

[5]Notably, in a statement to a case worker, Siepker's girlfriend confirmed that Siepker had been abstinent from alcohol since May 1998. Stephanie said Siepker drank to compensate for feelings of anxiety that he experiences whenever he is around people. He only leaves the house once or twice a week and spends most of his time in his home. (R. 144)

respond appropriately to criticism from supervisors; get along with coworkers or peers without distracting them or exhibiting behavioral extremes; and set realistic goals or make plans independently of others. (R. 364-67)

Siepker saw Dr. Liautaud again on October 14, 1998, complaining of continued anxiety. The doctor noted Siepker had been eating excessive chocolate, but had not been drinking or smoking. Siepker reported less depression and anger control problems, but he continued to have anxiety and panic disorder symptoms. His depression and GI problems also were improved. The doctor instructed Siepker to quit eating chocolate, and he increased the dosage of Siepker's antidepressant medication. (R. 393)

On November 4, 1998, Lawrence Staples, M.D. performed a Residual Functional Capacity Assessment in which he found Siepker's impairment should not have more than minimal effect on basic work activities by March 4, 1999. (R. 368) On November 10, 1998, Herbert L. Notch, Ph.D. performed a Psychiatric Review Technique and Mental Residual Functional Capacity Assessment of Siepker. He found Siepker to have a moderate restriction of the activities of daily living and difficulties in maintaining social functioning, and frequent deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner, in work settings or elsewhere. He also found Siepker had one or two episodes of deterioration or decompensation in work settings. Nevertheless, he found Siepker was not significantly limited in his ability to remember locations and work-like procedures; understand, remember and carry out very short and simple instructions; understand and remember detailed instructions; sustain an ordinary routine without special supervision; work in coordination with or proximity to others without being distracted by them; make simple work-related decisions; complete a normal workday and work week without interruptions from psychologically based symptoms and perform at a consistent pace without an unreasonable number and length of rest periods; interact appropriately with the general public; ask simple questions or request assistance; accept instructions and respond

appropriately to criticism from supervisors; get along with coworkers or peers without distracting them or exhibiting behavioral extremes; maintain socially appropriate behavior and adhere to basic standards of neatness and cleanliness; respond appropriately to changes in the work setting; be aware of normal hazards and take appropriate precautions; travel in unfamiliar places; use public transportation; and set realistic goals or make plans independently of others.

Dr. Notch found Siepker to be moderately limited in his ability to maintain attention and concentration for extended periods and perform activities within a schedule; maintain regular attendance; and be punctual within customary tolerances. Dr. Notch found Siepker to be credible, to the extent that his allegations are supported by medical evidence. He noted Siepker has had significant problems with anxiety and panic disorder along with depression, but found him to be responding to medication and his medications seem adequate to control his symptoms. Dr. Notch opined Siepker would be able to do simple one- or two-step activities on a consistent basis by March 1999.

When Siepker next saw Dr. Liautaud on November 11, 1998, he reported things were going well since the increase in his medications. Siepker was more social and less agoraphobic, his temper and anger control problems were better, and his GI symptoms had improved. On December 9, 1998, he reported further improvement in his depression, but stated he continued to have anxiety and panic disorder symptoms and agoraphobia.

In January 1999, Siepker relapsed in his alcoholism and went on a drinking binge. He also was smoking marijuana. Siepker had stopped taking his Paxil and reduced his Pamelor, and he told Dr. Liautaud that he was angry. Siepker refused to enter inpatient treatment, and said he was not drinking but was still smoking marijuana. Nevertheless, Siepker reported an improvement in his depression and daytime sedation.

Siepker saw Dr. Liautaud again on March 10, 1999, and reported his tremors had improved. Siepker was very upset over an impending court battle with his ex-girlfriend over

custody of their children. Dr. Liautaud diagnosed Siepker with generalized anxiety disorder, panic disorder with agoraphobia, and major depressive disorder, all improved, with recent exacerbation of his anxiety and panic symptoms. He prescribed Pamelor and Clonazepam.

On April 14, 1999, Siepker reported to Dr. Liautaud that he had stopped smoking, and he denied any return to substance abuse. He was angry due to quitting smoking, but denied any symptoms of anxiety or depression.

On May 11, 1999, Dr. Liautaud wrote an opinion letter to Siepker's attorney in which the doctor stated:

> [Siepker] has a severe Panic Disorder that includes Agoraphobia. He has not been able to return to work since his last employment and continues to have significant symptoms; in fact symptoms had increased in nature severely in the last two years that had been complicated by alcohol abuse He was eventually treated for bleeding ulcers; had life saving surgery and he remains impaired regarding his Major Depression, Generalized Anxiety and Panic Disorder.

(R. 384) Dr. Liautaud completed a questionnaire on May 18, 1999, at the request of Siepker's attorney, in which the doctor opined Siepker's current condition did not involve drug addiction or alcoholism. He noted specifically that "Siepker did have a history of alcohol abuse, however, it was felt that possibly it was due to self medication to control his Anxiety and Panic Disorder symptoms. In reviewing of the progress notes over the years, do not see any evidence of Cannabis or other drug abuse and believe the report stating marijuana abuse was inaccurate." (R. 394) Dr. Liautaud cited Siepker's current diagnoses as Panic Disorder with Agoraphobia; Generalized Anxiety Disorder; Major Depressive Disorder, current, severe, without mood congruent psychotic features or suicidal ideation or attempt; alcohol abuse/dependence by history; partner relational problems, parent/child relational problems. He opined the mental limitations from these diagnoses are not caused

or exacerbated by drug or alcohol use. (*Id.*). Finally, Dr. Liautaud opined that in the absence of any drug or alcohol use, Siepker's condition still would be disabling. He felt it was Siepker's symptoms that led to his substance abuse, rather than the other way around. (R. 395).

4. The ALJ's conclusion

The ALJ found Siepker has "severe impairments of generalized anxiety disorder, alcohol addiction, panic disorder with agoraphobia, episodes of hemorrhagic gastritis, depressive disorder, and cirrhosis of the liver," and is "status post laparotomy, splenectomy, vagotomy, and pyloroplasty." (R. 30, ¶ 2) She found Siepker had not engaged in substantial gainful activity since June 1, 1996. (*Id.*, ¶ 1)

The ALJ held Siepker's subjective complaints of disability were "less than fully credible" (*Id.*, ¶ 3), and Siepker has the residual functional capacity to perform work-related activities with the following minimal limitations:

> he is slightly limited regarding his ability to perform activities of daily living, he is able to maintain social functioning with friends, family and individuals he knows. He has marked difficulties in certain social functioning. He has no limitations regarding the ability to concentrate. There have been no episodes of deterioration or decompensation in work or work-like settings.

(R. 30-31, ¶¶ 3 & 4). The ALJ found Siepker is able to perform his past relevant work as a carpet layer and production assembler. (R. 31, ¶¶ 5 & 6)

Noting Siepker's difficulties in maintaining social functioning are exacerbated by the effects of substance abuse (R. 17), the ALJ held Siepker would not be disabled if he stopped using alcohol, and he was not under a disability at any time through the date of the ALJ's decision. (*Id.*, ¶¶ 7 & 9) In addition, the ALJ held Siepker had not shown good cause to warrant the reopening of his prior denial of benefits. (*Id.*, ¶ 8; R. 16)

The ALJ declined to rely on Dr. Liautaud's reports due to several inconsistencies between the doctor's opinion letters and his treatment notes through the years. Although Dr. Liautaud opined that Siepker's mental limitations are not caused or exacerbated by addiction or alcoholism (*see* R. 394-95), the ALJ noted this assertion "conflicts with Dr. Liautaud's own notations that alcohol and marijuana exacerbat[e] the claimant's mental illness." (R. 25) The ALJ observed, "Regardless of which illness came first, the claimant has continued to exacerbate his mental illnesses with alcohol abuse." (*Id.*)

The ALJ similarly declined to rely on the opinions of consulting psychologist Herbert Notch, noting that "[a]lthough Dr. Notch opined the claimant's alcohol abuse was not active, and therefore not material, he did not have access to the additional medical records indicating the claimant resumed use of alcohol after [the relevant] period." (R. 26) The ALJ concluded that when Siepker remains abstinent from alcohol and marijuana, takes his medications as directed, and otherwise is compliant with his doctors' treatment instructions, his condition improves and, by Siepker's own report, "his anxiety and depression [are] 60 percent better or more." (R. 28)

In support of her finding that Siepker's subjective complaints lacked credibility, the ALJ noted:

> Mr. Siepker's assertion that he is <u>unable</u> to be around others is not well supported by credible evidence of record. He leaves his home to do things he enjoys. He is able to shop and attend meetings with his girlfriend, even when not taking his medication. He acknowledged that with proper medication his anxiety and depression [are] 60 percent better or more. He indicated that he avoided crowds but was able to go to the grocery store. The claimant testified that Dr. Liautaud told him not to drive while taking [Klonopin], however, the psychiatrist stated this after the claimant had been charged with driving while under the influence and in connection with keeping him out of jail. Mr. Siepker reported he was unable to do things away from home for extended periods. Unfortunately,

> he has not been compliant with a treatment regimen to address his anxiety. The undersigned finds the claimant to be less than fully credible due to numerous inconsistencies in the record and statements regarding substance abuse.

(R. 28)

The ALJ recognized that the VE opined someone with Siepker's limitations would be precluded from all employment, if the VE included the limitations of being uncomfortable in public situations and in leaving home for extended periods of time without a companion. However, the ALJ found that these additional social limitations arise from Siepker's alcohol abuse and noncompliance with treatment recommendations. Thus, the ALJ found the first hypothetical posed to the VE more accurately approximated Siepker's condition. (R. 29)

Finally, the ALJ noted repeated attempts were made post-hearing to obtain consultative examinations, but Siepker "repeatedly failed to attend interviews with consultative physicians . . . [d]espite personal contacts on the day of the claimant's appointment[.]" (R. 29-30) Siepker's attorney therefore "reported that he would proceed without the additional evaluation." (*Id.*)

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD

Section 423(d) of the Social Security Act defines a disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is "not only unable to do his previous work but cannot, considering . . . his age, education and work experience, engage in any other kind of substantial gainful work which exists in

[significant numbers in] the national economy . . . either in the region in which such individual lives or in several regions of the country." 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *see Kelley*, 133 F.3d at 587-88 (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner must determine whether the claimant is currently engaged in substantial gainful activity. Second, he looks to see whether the claimant labors under a severe impairment; *i.e.*, "one that significantly limits the claimant's physical or mental ability to perform basic work activities." *Kelley*, 133 F.3d at 587-88. Third, if the claimant does have such an impairment, then the Commissioner must decide whether this impairment meets or equals one of the presumptively disabling impairments listed in the regulations. If the impairment does qualify as a presumptively disabling one, then the claimant is considered disabled, regardless of age, education, or work experience. Fourth, the Commissioner must examine whether the claimant retains the residual functional capacity to perform past relevant work.

Finally, if the claimant demonstrates the inability to perform past relevant work, then the burden shifts to the Commissioner to prove there are other jobs in the national economy that the claimant can perform, given the claimant's impairments and vocational factors such as age, education and work experience. *Id.*; *Hunt v. Heckler*, 748 F.2d 478, 479-80 (8th Cir. 1984) ("[O]nce the claimant has shown a disability that prevents him from returning to his previous line of work, the burden shifts to the ALJ to show that there is other work in the national economy that he could perform.") (citing *Baugus v. Secretary of Health & Human Serv.*, 717 F.2d 443, 445-46 (8th Cir. 1983); *Nettles v. Schweiker*, 714 F.2d 833, 835-36 (8th Cir. 1983); *O'Leary v. Schweiker*, 710 F.2d 1334, 1337 (8th Cir. 1983)).

Step five requires that the Commissioner bear the burden on two particular matters:

> In our circuit it is well settled law that once a claimant demonstrates that he or she is unable to do past relevant work, the burden of proof shifts to the Commissioner to prove, first that the claimant retains the residual functional capacity to do other kinds of work, and, second that other work exists in substantial numbers in the national economy that the claimant is able to do. *McCoy v. Schweiker*, 683 F.2d 1138, 1146-47 (8th Cir. 1982) (*en banc*); *O'Leary v. Schweiker*, 710 F.2d 1334, 1338 (8th Cir. 1983).

Nevland v. Apfel, 204 F.3d 853, 857 (8th Cir. 2000) (emphasis added) *accord Weiler*, 179 F.3d at 1110 (analyzing the fifth-step determination in terms of (1) whether there was sufficient medical evidence to support the ALJ's residual functional capacity determination and (2) whether there was sufficient evidence to support the ALJ's conclusion that there were a significant number of jobs in the economy that the claimant could perform with that residual functional capacity); *Fenton v. Apfel*, 149 F.3d 907, 910 (8th Cir. 1998) (describing "the Secretary's two-fold burden" at step five to be, first, to prove the claimant has the residual functional capacity to do other kinds of work, and second, to demonstrate that jobs are available in the national economy that are realistically suited to the claimant's qualifications and capabilities).

Governing precedent in the Eighth Circuit requires this court to affirm the ALJ's findings if they are supported by substantial evidence in the Record as a whole. *Weiler v. Apfel*, 179 F.3d 1107, 1109 (8th Cir. 1999) (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); *Kelley v. Callahan*, 133 F.3d 583, 587 (8th Cir. 1998) (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . ."). Under this standard, substantial evidence means something "less than a preponderance" of the evidence, *Kelley*, 133 F.3d at 587, but "more than a mere scintilla," *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971); *accord Ellison v. Sullivan*, 921 F.2d 816, 818 (8th Cir. 1990). Substantial

evidence is "relevant evidence which a reasonable mind would accept as adequate to support the [ALJ's] conclusion." *Weiler*, 179 F.3d at 1109 (again citing *Pierce*, 173 F.3d at 706); *Perales*, 402 U.S. at 401, 91 S. Ct. at 1427; *accord Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993); *Ellison*, 91 F.2d at 818.

Moreover, substantial evidence "on the record as a whole" requires consideration of the Record in its entirety, taking into account "'whatever in the record fairly detracts from'" the weight of the ALJ's decision. *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *accord Gowell, supra; Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213). Thus, the review must be "more than an examination of the Record for the existence of substantial evidence in support of the Commissioner's decision"; it must "also take into account whatever in the Record fairly detracts from the decision." *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Gavin v. Heckler*, 811 F.2d 1195, 1199 (8th Cir. 1987)). The court, however, does "not reweigh the evidence or review the factual record *de novo.*" *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (quoting *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it "possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's findings, [the court] must affirm the [Commissioner's] decision." *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992) (citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); *see Hall v. Chater*, 109 F.3d 1255, 1258 (8th Cir. 1997) (citing *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996)). This

is true even in cases where the court "might have weighed the evidence differently," *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)), because the court may not reverse "the Commissioner's decision merely because of the existence of substantial evidence supporting a different outcome." *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997); *accord Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001); *Gowell, supra.*

On the issue of an ALJ's determination that a claimant's subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ's credibility determinations are entitled to considerable weight. *See, e.g., Young v. Secretary of H.H.S.*, 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen*, 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.*, 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.*, 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant's subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the Record as a whole. *See Hinchey v. Shalala*, 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan*, 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). Under *Polaski:*

> The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:
>
> 1) the claimant's daily activities;
> 2) the duration, frequency and intensity of the pain;
> 3) precipitating and aggravating factors;
> 4) dosage, effectiveness and side effects of medication;
> 5) functional restrictions.

Polaski, 739 F.2d at 1322.

IV. ANALYSIS

A. Determination of Disability Onset Date

Before considering the Commissioner's motion for sentence four remand, the court will address an issue raised by the Commissioner as to the proper disability onset date for purposes of Siepker's application for benefits.

Siepker filed a prior application for SSI benefits on June 20, 1996, alleging disability onset date of June 1, 1996 (R. 114-15). The application was denied initially on September 19, 1996 (R. 85, 89-93), and on reconsideration on December 5, 1996 (R. 86, 96-99). Siepker did not appeal the unfavorable determination. (*See* R. 14) Siepker has alleged the same disability onset date of June 1, 1996, in the application that is the subject of the present appeal. The Commissioner argues Siepker is precluded from claiming disability prior to December 5, 1996 – the date on which a final decision was issued denying him benefits in his prior claim – under the doctrine of *res judicata*. *See* Doc. No. 17, p. 2 (citing *Califano v. Sanders*, 430 U.S. 99, 107-09, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977) and 20 C.F.R. §§ 416.1487, 416.1488, and 416.1489).

The ALJ's decision not to reopen Siepker's prior claim is not judicially reviewable. *See Kaszer v. Massanari*, 2002 WL 1589924 (3d Cir. July 19, 2002) (unpublished disposition) (citing *Califano, supra; Coup v. Heckler*, 771 F.2d 682, 317 (3d Cir. 1985)). However, as the court noted in *Kaszer*,

> "[W]e will examine the record to determine whether or not a reopening has occurred." *Coup*, 834 F.2d at 317. We will find a reopening, and thus a waiver of *res judicata*, "where the administrative process does not address an earlier decision, but instead reviews the entire record in the new proceeding and reaches a decision on the merits." *Kane v. Heckler*, 776 F.2d 1130 (3d Cir. 1985). We may find after looking at the

> administrative record that the reopening has been either explicit or *de facto*. *Coup*, 834 F.2d at 317.

Kaszer at *3. The Eighth Circuit Court of Appeals explained what constitutes constructive or *de facto* reopening of a claim in *King v. Chater*, 90 F.3d 323 (8th Cir. 1996):

> Absent a colorable constitutional challenge, federal courts generally do not have jurisdiction to review refusals to reopen claims for disability benefits. *Califano v. Sanders*, 430 U.S. 99, 107-09, 97 S. Ct. 980, 985-86, 51 L. Ed. 2d 192 (1977). However, there is an exception to this general rule: where a claim has been reconsidered on the merits, it is properly treated as having been reopened as a matter of administrative discretion. *Jelink v. Heckler*, 764 F.2d 507, 508 (8th Cir. 1985). Consequently, the decision is subject to judicial review to the extent that it has been reopened. *Id.* This is known as a constructive or *de facto* reopening.

King, 90 F.3d at 325.

In the present case, the court finds the ALJ did not address the merits of Siepker's earlier claim. As was the case in *King*, the ALJ here considered Siepker's earlier medical evidence only in connection with his present application. "Mere consideration of evidence from an earlier application is not considered a reopening of the earlier claim." *Id.* (citing *Boock v. Shalala*, 48 F.3d 348, 352 n.4 (8th Cir. 1995). Accordingly, the court finds there has been no reopening of Siepker's earlier claim, whether actual, constructive or *de facto*, and therefore Siepker is precluded from any finding of disability prior to December 5, 1996.

B. The Commissioner's Motion for Remand

The Commissioner asks the court to remand this case for further proceedings pursuant to sentence four of 42 U.S.C. § 405(g). The Commissioner notes she only determined remand was appropriate while she was in the process of preparing her brief in this case. The Commissioner suggests that if this case is remanded, she will direct the ALJ:

> to consider the additional evidence submitted to the Appeals Council which was not included in the administrative record or considered on review of the ALJ's decision; properly consider the medical evidence from [Siepker's] treating psychologist, T.R. Liautaud, D.O.; properly evaluate the specific limitations from [Siepker's] mental impairments indicating how "marked difficulties in certain social functioning" affects his ability to work; consider how [Siepker's] ability to only maintain social functioning with friends, family, and individuals he knows would affect his ability to perform the functions of his past relevant work; conduct a proper drug addiction and/or alcoholism analysis; and obtain medical expert testimony from a psychiatrist to clarify the severity of [Siepker's] mental impairment.

(Doc. No. 13, pp. 1-2)

A sentence four remand is appropriate whenever the district court makes a substantive ruling regarding the correctness of a decision of the Commissioner and remands the case in accordance with such a ruling." *Buckner v. Apfel*, 213 F.3d 1006, 1010 (8th Cir. 2000) (citing *Melkonyan v. Sullivan*, 501 U.S. 89, 98, 111 S. Ct. 2157, 115 L. E. 2d 78 (1991)). "To remand under sentence four, the district court must conduct a plenary review of the entire record and make a judgment either affirming, modifying, or reversing the Commissioner's decision to deny benefits." *Hanson v. Chater*, 895 F. Supp. 1279, 1283 (N.D. Ia. 1995) (citing *Seaborn v. Sullivan*, 822 F. Supp. 121, 124 (S.D.N.Y. 1993)).

After a plenary review of the record, the court finds the Commissioner's decision to deny Siepker benefits must be reversed and this case remanded. In particular, the court finds the ALJ failed to assign the proper weight to the opinions of Dr. Liautaud, failed to make a particularized assessment of the severity of Siepker's mental impairments, and failed to consider fully the impact of Siepker's alcoholism (whether active or in remission) on his mental condition and ability to work. Although the record as a whole does not contain substantial evidence to support the ALJ's denial of benefits, neither does the record before

the ALJ support the opposite conclusion. Therefore, remand is appropriate for further consideration of the evidence and further development of the record.

V. CONCLUSION

For the reasons set forth above, the court **grants** the Commissioner's motion for remand (Doc. No. 12), and **directs entry of judgment in favor of Siepker and against the Commissioner**. This case is remanded pursuant to sentence four of 42 U.S.C. § 405(g), for further proceedings. Upon remand, the ALJ is directed to reconsider the evidence from Dr. Liautaud, to further develop the record as necessary for a complete and accurate finding as to Siepker's disability, and to render an amended opinion based on the complete record.

IT IS SO ORDERED.

DATED this 14th day of August, 2002.

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PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT